

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

12-7-77

77-6161

To be argued by
EILEEN FITZGERALD SUDLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6161

LLEWELYN S. BAILEY,
Plaintiff-Appellant,

—v.—

VETERANS ADMINISTRATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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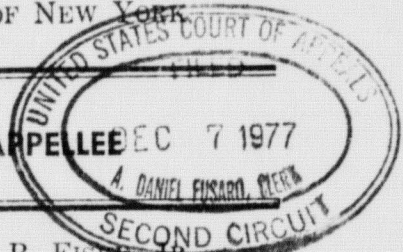


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BRIEF OF DEFENDANT-APPELLEE

Statement of the Case

Plaintiff Llewelyn S. Bailey seeks review of a final judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, J., granting defendant's motion for summary judgment and dismissing Bailey's complaint for reinstatement as a hospital Supervisory Police Officer with the Veterans Administration (the "VA").

Bailey was hired by the VA in 1974 as a Hospital Police Officer. Assigned to the VA Hospital at 24th Street and First Avenue in Manhattan, Bailey was promoted in early 1975 to Supervisory Police Officer, a position that he held until he was fired on July 13, 1976. (A-246) Bailey's removal resulted from a complaint by Mr. Harold Schwartz, who charged that Bailey had punched and otherwise assaulted him on the evening of May 14, 1976, when Schwartz was visiting a patient at the hospital. After his removal by the VA, Bailey ap-

pealed to the United States Civil Service Commission, Federal Employees Appeals Authority ("FEAA") pursuant to Part 752, Subpart B, of the Civil Service Regulations, 5 C.F.R. § 752. At Bailey's request, FEAA conducted a hearing on September 14, 1976 to determine whether the VA was justified in removing Bailey. On the basis of the entire administrative record, including the testimony of all witnesses at the September 14, 1977 hearing, FEAA affirmed the VA's removal action and denied Bailey's appeal. The FEAA's decision constituted final agency action. 5 C.F.R. § 772.309(b).

Bailey then brought suit in the United States District Court, seeking judicial review of his removal. On May 6, 1977 Bailey filed a motion asking for reinstatement with full compensation. Defendant construed Bailey's motion as one for summary judgment and cross-moved for judgment on June 7, 1977. The transcript of the administrative record was submitted by defendant as an exhibit to its motion papers. On the basis of the administrative record, the District Court concluded that FEAA's decision was supported by substantial evidence and was not arbitrary, capricious or an abuse of discretion. Judgment was entered for defendant on August 31, 1977. Bailey filed a timely Notice of Appeal to this Court on September 29, 1977.

Issue Presented

The sole issue to be determined on this appeal is whether the District Court properly concluded that Bailey's removal was not arbitrary or capricious and that such removal was effectuated in compliance with the statutory procedures for the removal of a federal employee. *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2d Cir. 1964).

Statement of Facts

At the hearing held on September 14, 1976 the VA was represented by James Forsetta, Hospital Administrative Officer. (A-10) Bailey was present throughout the hearing and was represented by counsel, Julian Linker, Esq. (A-10) The hearing was conducted by Assistant Appeals Officer Dennis Marachi and the testimony of all witnesses was taken under oath.

The Agency's Case

Harold Schwartz, a self-employed consultant in the fields of electronics engineering and business planning (A-18), testified that on the evening of May 14, 1976 he was visiting a friend, Mr. Joseph Kaswan, who was a patient at the VA Hospital. (A-19) At approximately 8:50 p.m. a nurse informed Schwartz that it was after visiting hours, whereupon Schwartz prepared to leave. Kaswan, who was wheelchair-bound, accompanied Schwartz to the lobby. (A-19) While Schwartz was on his way to the exit door, Bailey said something which was inaudible to Schwartz and Kaswan (A-19), and Kaswan replied, "I beg your pardon. I couldn't hear you". (A-20) Bailey, with his back to the patient and his visitor, again said something inaudible, and Kaswan again stated, "I'm sorry. I still can't hear you". (A-20) Bailey then turned around and stated that Kaswan had heard very well what he had said. Schwartz then objected to Bailey's calling Kaswan a liar. At this point, according to Schwartz' testimony, Bailey became belligerent—he moved towards Schwartz, saying, "You're not supposed to be here now," and then grabbed Schwartz by the arm (A-20) and started dragging him toward a back room. (A-21)

Bailey's conduct was so sudden and unexpected that Schwartz initially refused to go anyplace unless he was told "what this is all about". Bailey never told Schwartz

what he was doing (A-22) and instead threatened to handcuff Schwartz and get other guards to drag him away. (A-21) During this encounter, Hospital Police Officer William Parker approached Schwartz, politely explained what was happening, asked Schwartz to go with Bailey, and offered to go along himself. (A-21, 23) Schwartz then went with Bailey to a back room. The door to the room was closed and Kaswan was not permitted inside. (A-23)

While they were in the back room, Bailey was rude and threatened Schwartz.* Bailey kept Schwartz in the back room for about one-half hour to fill out two summonses that could have been completed in a matter of minutes. (A-25) Schwartz testified that he was concerned about his sick friend waiting all this time, and wanted to tell him to go back to his room. Schwartz started to tell Bailey what he was going to do, and put his hand on the doorknob, when Bailey "jumped up from his chair, came running over, pulled back his right arm . . . this was preparatory to hitting me in the face which he proceeded to do and grab me and drag me back to the chair". Bailey struck Schwartz once on the jaw. (A-20) Schwartz testified that when Bailey pulled back his arm to hit him, Bailey's elbow struck the shade on the door window causing it to fly up. Kaswan was directly outside, as were Parker and another officer. After punching Schwartz Bailey completed the summons, returned Schwartz' identification, and let him go. (A-28) As a result of this encounter, Schwartz testified, his face was sore and slightly swollen for about two weeks, his arm was bruised, and the skin was slightly broken where Bailey had grabbed him. (A-30)

* Schwartz stated that Bailey ordered him to sit while Bailey filled out the summonses or he would be "made to" sit. (A-24, 25)

Mr. Linker, Bailey's attorney, cross-examined Schwartz at length (A-32-76) on all aspects of his testimony, but failed to elicit any contradiction of that testimony or any motive to fabricate.

The second witness who testified at the hearing was Joseph Kaswan, a self-employed business man in the area of combustion processes. (A-80) Kaswan was the patient with whom Schwartz was visiting on the day of the incident.

Kaswan corroborated Schwartz' testimony in all material aspects by testifying as follows: On May 14, 1976 Schwartz inadvertently stayed past visiting hours and, when a nurse informed Schwartz of that fact, Schwartz and Kaswan went down to the lobby so that Schwartz could leave the hospital. (A-82) While Kaswan was on his way to the door with Schwartz, he heard Bailey say something that he could not understand.* After twice being asked to repeat what he said, Bailey stated that Kaswan had heard him. Schwartz then objected to Bailey's calling Kaswan a liar (A-84), whereupon Bailey got angry and rushed over to Schwartz, took hold of him and started to drag him away. (A-84) Schwartz was taken into a back room and the door shade pulled down. (A-86) According to Kaswan, "Then all of a sudden the shade flew up and I saw Mr. Bailey with his back to me, swing his arm forward and I saw his hand strike Schwartz' face". (A-87) Kaswan corroborated the fact that Schwartz had been kept in the back room for about one-half hour.**

* Kaswan stated that he suffered from a service-connected loss of hearing (A-83), which causes him to hear sound without being able to distinguish words. (A-95)

** Kaswan stated it was about 8:55 when he and Schwartz reached the lobby (A-91), and about 9:30 when Bailey allowed Schwartz to leave. (A-87)

Bailey's attorney cross-examined Kaswan at length (A-89-120) but elicited no contradictions, retractions or motive to fabricate.

The third witness called by the VA was hospital Police Officer William Parker. On direct examination, Parker stated that on May 14, 1976, at about 8:55 p.m., he heard shouting in the lobby of the VA Hospital. Bailey was shouting that Schwartz should have left the hospital, and Parker stepped in and said "well, okay, it's been done" (A-121) and told Bailey to let Schwartz go. Instead, Bailey took Schwartz by the arm and escorted him to a back room. (A-122) Shortly thereafter, upon hearing Kaswan shout "Oh my God he's hitting my friend" (A-123), Parker entered the back room and "separated" Bailey and Schwartz (123). Parker testified with assurance that the shade had been up when Kaswan shouted. (A-123) Parker also stated that Schwartz said "Did you see him hit me". (A-125)

Bailey's attorney cross-examined Parker. (A-130-154) Mr. Linker asked Parker questions concerning hospital regulations governing visiting hours (A-130, 131); Parker answered that an individual would have to stand directly in front of posted regulations in order to be able to read them. (A-133) Linker also inquired about the standard procedure for locking doors after visiting hours (A-130); Parker responded that the front door is not locked until nine o'clock each night (A-130, 141), and that visitors "tend toward lateness and they don't leave until 9". (A-141) Parker stated on cross-examination that he had had some prior problems with Bailey (A-151) because of the way Bailey spoke to him. (A-152) Parker stated on redirect examination that hospital police officers are trained to be courteous and understanding to people with whom they deal (A-155) and not to engage in shouting matches, as Bailey had done. (A-157) In sum, Parker corroborated the testimony of Schwartz and Kaswan in

the important areas of Bailey's demeanor, the fact that the window shade had been up, and that Schwartz and Kaswan had made contemporaneous statements that Bailey had struck Schwartz.

The final witness called by the VA was David R. Siley, Chief of Hospital Security. (A-165) Siley stated that on May 17, 1977 he received a communication from the Assistant Hospital Director advising him of a complaint by Kaswan that Bailey had abused and assaulted a visitor. Siley attempted to interview Kaswan on three occasions before Kaswan's discharge, but could not locate him. (A-166) Siley stated that he had notified Bailey of the complaint in person the very next time Bailey came on duty (A-167), and Bailey had responded that Schwartz had refused to leave the hospital, that Bailey had given him two summonses, and that nothing more had happened. (A-167) Siley spoke to Parker a couple of days after talking to Bailey (A-168), and at that time, Parker told Siley about Kaswan shouting "he hit my friend" and about Parker's separating Bailey and Schwartz. (A-169)

Siley testified that Kaswan and Schwartz came to the hospital and made a complaint on June 3, 1976. The very next day, Bailey was told by Michael Horton, the Chief of Internal Service, in Siley's presence, that a serious complaint had been filed against him. Bailey remained in Horton's office for about three-quarters of an hour discussing the May 14 incident. Again, cross-examination by Bailey's attorney (A-175-201) failed to undermine or change the witnesses' testimony in any material respect.

Bailey's Case

At the close of the VA's case (A-203), Bailey's attorney called his first witness, Samuel B. Mitzner, a freelance housing consultant. (A-205) Mitzner testified that

he had repaired shades in his own house and the houses of his wife and grandfather. (A-206) Mitzner's testimony was that on the day before the September 14, 1976 hearing (four months after the incident), he accompanied Linker to the VA hospital and tested the shade on the door of the room where Bailey had allegedly struck Schwartz (A-208), but the shade did not fly up when Mitzner hit it. (A-210) On cross-examination, Mitzner said he did not know whether he had tested the shade that was on the door on the day of the incident (A-212), or whether the shade had been loose or tight on the day of the incident. (A-227)

Bailey's second witness was Michael Everett, president of the local union of which Bailey was a member. (A-229) Everett testified that Bailey should have been accompanied by a union representative to the June 4 interview with Horton and Siley according to the union's contract. (A-232) No copy of the union contract was introduced at the hearing, however, and the VA's representative, Mr. Forsetta, refused to stipulate to the existence of such a provision because he said he was familiar with the contract and it did not contain such a provision. (A-237) The hearing examiner left the proceeding open for ten days for the limited purpose of permitting Everett to submit a copy of the collective bargaining agreement. A copy of the agreement having been submitted, the examiner found that it did not contain a provision for notification to an employee of his right to representation even at a grievance procedure. (A-302)

Finally, Bailey himself testified concerning the incident. (A-243-281) Bailey stated that on May 14, 1976 at about 9:10 p.m., he had seen Schwartz and Kaswan enter the lobby (A-254), and had told them that patients were not permitted in the lobby. Bailey claimed that Schwartz had started shouting at him and that he ordered Schwartz to leave, but Schwartz refused. (A-253, 254)

Bailey then asked Schwartz to accompany him to the office but Schwartz refused, so Bailey took him by the arm. (A-253) Bailey denied that Parker had separated them (A-257, 258) or that he had ever struck Schwartz. (A-259)

The hearing examiner permitted closing statements by Forsetta for the VA (A-281-283), and Linker for Bailey (A-285-295), after which the hearing was closed. (A-296)

Relevant Regulations

5 C.F.R. § 752.202 Procedures.

(a) Notice of proposed adverse action.

(1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

(3) Material which cannot be disclosed to the employee, or to his designated physician under § 294.40, of this chapter, may not be used by an agency to support the reasons in the notice.

(b) Employee's answer. Except as provided in paragraph (c) of this section, an employee is

entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employer believes might sway the final decision of his case, but does not include the right to a trial or formal hearing with examination of witnesses.

When the employee requests an opportunity to answer personally, the agency shall make a representative available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

(c) *Exceptions to notice period and opportunity to prepare answer.*

(1) Advance written notice and opportunity to answer are not necessary in cases of furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God or emergencies requiring immediate curtailment of activities.

(2) When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency is not required to give the employee the full 30 days' advance written notice, but shall give him such less number of days advance notice and opportunity to answer as under the circumstances is reasonable and can be justified.

(d) *Duty status during notice period.* Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period. When circumstances are such that the retention of the employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of Government or injurious to the employee, his fellow workers, or the general public, the agency may temporarily assign him to duties in which these conditions will not exist or place him on leave with his consent.

(e) *Suspensions during notice period.* In an emergency case when, because of the circumstances described in paragraph (d) of this section, an employee cannot be kept in an active duty status during the notice period, the agency may suspend him. This suspension is a separate adverse action. An employee whose suspension under this paragraph is proposed is entitled, in connection with the suspension, to the following:

(1) If the suspension is for more than 30 days, to the procedures required by this subpart;

(2) If the suspension is for 30 days or less and the employee is covered under § 752.301, to the procedures required by Subpart C of this part; or

(3) If the suspension is for 30 days or less and the employee is in the excepted service and not covered by § 752.301, to a written notice at least 24 hours in advance of the effective date of the suspension. The agency shall include in the notice of suspension the reasons for not retaining the employee in an active duty status during the notice period. If the employee appeals from the final adverse decision. The Commission reviews the reason for not retaining him in an active duty status to determine staff consonance with the circumstances described in paragraph (d) of this section. The agency may place the employee on a non-duty status with pay for such time, not to exceed 5 days, as is necessary to effect the suspension.

(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when there is one, than the official who proposed the adverse action. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the Commission;

(3) Of the time limit for appealing as provided in section 752.203; and,

(4) Where he may obtain information on how to pursue an appeal.

ARGUMENT

POINT I

Proper Procedures Were Followed By The VA In Removing Bailey.

Bailey argues on appeal, as he did below, that he was not afforded due process in his removal proceeding. The Supreme Court has specifically held that the removal of a federal employee pursuant to 5 U.S.C. § 7501 and the regulations promulgated thereunder is constitutionally permissible. *Arnett v. Kennedy*, 416 U.S. 134, 163 (1974). The only inquiry, then, is whether those procedures were followed in this instance and whether the decision to remove Bailey was arbitrary and capricious. *McTiernan v. Gronouski*, *supra*, 337 F.2d at 34.

Title 5, United States Code, Section 7501 provides in relevant part:

§ 7501. Cause; procedure; exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to——

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

It is established that the language permitting removal "for such cause as will promote the efficiency of the service" is not subject to attack on charges of overbreadth or vagueness. *CSC v. Letter Carriers*, 413 U.S. 548, 578-79 (1973); *Arnett v. Kennedy*, *supra*, 416 U.S. at 159.

Each of the procedural requirements set forth in 5 U.S.C. § 7501(b) was met in this case. Bailey was notified in writing of the proposed removal action and the reasons therefor by letter dated June 10, 1976 (A-307), hand delivered to him the next day (A-172, 263). The notice specified the time and date of the incident, the nature of the complaint and the names of the complainant and his witness, and advised Bailey, in compliance with the requirement of 5 U.S.C. § 7501(b)(3), that he had the opportunity to reply orally or in writing to the charges at any time until the close of business on June 23, 1976. In fact, Bailey did make an oral response to the charges on June 21, 1976, accompanied by two union representatives. (A-230, 265). Bailey was advised by letter dated July 2, 1976 of the agency's decision to terminate his employment effective July 13, 1976 and

of his right to appeal. (A-309)* This notification satisfied the requirement of 5 U.S.C. § 7501(b)(4).

The VA also complied fully with the regulations governing the removal of a civil servant. In conformity with the relevant regulations, Bailey was given 30 days' written notice of the proposed action (5 C.F.R. § 752.202(a)(1)).** The requirements of 5 C.F.R. § 752.202(a)(2) were satisfied by paragraph 2 of the June 10, 1976 proposed removal letter (A-307) wherein Bailey was invited to review, on official duty time, all evidence on which the proposed removal action was based. A reasonable time to reply in writing or orally was afforded Bailey (paragraph 3, June 10, 1976 removal letter (A-307)), pursuant to 5 C.F.R. § 752.202(b). Bailey was retained on active duty pursuant to 5 C.F.R. § 752.202(d) until July 13, 1976, the effective date of removal. (Paragraph 7, June 10, 1976 removal letter (A-308)). Written notice of the decision to remove him was hand delivered to Bailey on July 2, 1976, and that notice contained all of the information required by 5 C.F.R. § 752.202(f). (A-309)

Bailey complains that his right to due process was violated in the removal proceeding. However, Bailey's property interest in his job was limited by the terms of his employment, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), i.e., that he would not be removed other than for "such cause as will promote the efficiency of the service" 5 U.S.C. § 7501. This limited right is not a guarantee against removal without cause in the abstract, but "such a guarantee as enforced by the procedures which Congress has designated for the determination of

* Pages 309 and 310 of the Appendix are copies of the same document. Page A-309 is a more legible copy, but page A-310 shows Bailey's acknowledgement of receipt.

** The removal was effective July 13, 1976; the written notice was hand-delivered to Bailey on June 11, 1976.

cause". *Arnett v. Kennedy*, 416 U.S. at 152. Thus, the only due process requirement is that the agency comply with the requirements of 5 U.S.C. § 7501 and the regulations. As demonstrated hereinabove, Bailey was accorded each and every procedural safeguard provided by the statute and regulations.*

POINT II

The Decision To Remove Bailey Was Neither Arbitrary Nor Capricious.

The District Court properly concluded that there was substantial evidence in the administrative record to support the charges that Bailey had physically and verbally abused a visitor to the hospital, and that the agency had not acted arbitrarily in removing him.

The evidence presented by the VA at the hearing below was substantial. Both Kaswan and Schwartz testified that Bailey had struck Schwartz without provocation or justification. Parker corroborated the testimony of Kaswan and Schwartz. The District Court correctly pointed out that Bailey's "attempts to impeach the credibility of these witnesses and otherwise to contradict them did no more than raise an issue of fact. . . ." The trier of fact had an opportunity to observe each of the witnesses. He concluded that the agency's witnesses were credible, and that Bailey was not. This determination is not reviewable in light of the court's limited role in reviewing the removal of a federal employee. *McTiernan v. Gronouski*, *supra*, 337 F.2d at 34.

* Another procedural objection raised in appellant's brief is that Forsetta asked leading questions at the hearing. This issue was not raised below and, in any event, is not meritorious since the rules of evidence are not strictly applied in such a hearing. 5 C.F.R. § 771.210(c). Furthermore, appellant was represented at the hearing by counsel, who did not object.

CONCLUSION

The decision of the FEAA affirming the removal of appellant from the position of hospital Supervisory Police Officer was neither arbitrary nor capricious, and was in accordance with the procedural provisions of the relevant statute and regulations. The District Court properly granted summary judgment for defendant and that judgment should be affirmed.

Respectfully submitted,

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